

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY
ALCOHOL & GAMBLING ENFORCEMENT DIVISION

In the Matter of a Civil Penalty Imposed
on C. A. Wagner's, Inc., d/b/a Miller's
on Main

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy (ALJ) on February 16, 2010, at the Office of Administrative Hearings, in St. Paul, Minnesota. The OAH hearing record closed at the conclusion of the hearing that day.

David J. Koob, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101, appeared on behalf of the Department of Public Safety (DPS or Department).

Chad Wagner (Licensee or Respondent) appeared for C.A. Wagner's, Inc., without counsel.

STATEMENT OF THE ISSUE

Did Miller's on Main serve alcohol to an obviously intoxicated person on October 10, 2009, in violation of Minn. Stat. § 340A.502?

The ALJ concludes that the Department proved by a preponderance of the evidence that Miller's on Main served alcohol to an obviously intoxicated person on October 10, 2009, in violation of Minn. Stat. § 340A.502.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Miller's on Main is a bar and restaurant located in Lino Lakes, Minnesota.
2. On October 10, 2009, the DPS Alcohol and Gambling Enforcement Division (AGED) conducted several Retail Alcohol Vendor Enforcement (RAVE) visits in the Lino Lakes area. RAVE is a DPS program focusing on educating liquor licensees to prevent service of alcoholic beverages to obviously intoxicated persons. Its purpose is to reduce the number of alcohol-related traffic offenses caused by impaired drivers.

RAVE visits are usually conducted on Friday and Saturday nights in coordination with Safe & Sober DWI enforcement programs conducted by the State Patrol and county and local law enforcement agencies.¹

3. Typically, DPS/AGED agents work in teams of two and visit licensed liquor establishments at random. The teams are usually made up of one DPS special agent, who is a licensed peace officer, and one DPS special investigator. Together they observe the clientele at bars and restaurants to see whether persons who appear to be obviously intoxicated are served alcoholic beverages. The agents also distribute educational packets to the owners or managers of the establishments that include a letter from the DPS explaining the RAVE program and identifying the governing Minnesota statutes.²

4. Special Agent Cliff Emmert has been a licensed peace officer since 1976 and has worked for DPS/AGED for approximately 13 years. Special Agent Emmert's duties include performing compliance checks on licensed liquor establishments and investigating alleged violations of gambling regulations. He has conducted approximately 12 RAVE visits in the past year.³

5. Special Investigator Michael Polla has been employed by DPS/AGED since 1986. His duties include conducting pre-license investigations and inspections of liquor establishments in Minnesota. He participates in RAVE visits and assists the special agents in conducting compliance checks of licensed liquor establishments. Investigator Polla estimates that he has worked 36 shifts conducting RAVE investigations and that he has inspected nearly 400 licensed liquor establishments. Investigator Polla is not a licensed peace officer.⁴

6. Before October 10, 2010, Emmert and Polla had conducted two previous RAVE visits at Miller's on Main. They observed no violations during those visits.⁵

7. In the early evening of October 10, 2009, Emmert and Polla attended a briefing at the Lino Lakes police department to introduce themselves to the Highway Patrol officers and local police officers involved in the DWI enforcement effort. Later that night they conducted RAVE visits at ten bars in the area.⁶

8. At about 11:30 p.m., Emmert and Polla went into Miller's on Main. There was a boisterous crowd seated at a table to the left of the doorway. Emmert and Polla sat at the bar, about ten to 15 feet away from the table, and they each ordered a beer.⁷

9. They observed a man walk from the table to behind the bar. He was unsteady on his feet while walking, and he swayed while talking to the bartender. The

¹ Testimony of Cliff Emmert.

² *Id.*

³ *Id.*

⁴ Testimony of Polla.

⁵ Testimony of Emmert.

⁶ *Id.*

⁷ *Id.*

bartender gave him two beers, and the man returned to the table and gave the beers to other persons seated there. He then returned to the bar, got another beer from the bartender, and returned to the table, where he began drinking the beer. On the second trip to the bar, Emmert noticed the same unsteadiness while walking and sway while standing still.⁸

10. Emmert approached the table and showed his credentials to the man, who subsequently identified himself as S.A., an off-duty employee of Miller's on Main. S.A. and several other off-duty employees were celebrating the birthday of a co-worker. Emmert told S.A. "You've had too much to drink," and he asked S.A. if he had a ride home. S.A. asked if he was in trouble, and when Emmert said no, S.A. told Emmert that he was not driving and that the bartender was giving him a ride home.⁹ During this conversation, Emmert noticed that S.A.'s speech was slurred and thick and that he smelled of alcohol.¹⁰

11. While Emmert was talking to S.A., Polla approached the bartender and advised her that she had served an obviously intoxicated person. The bartender replied "So what? I'm his ride home."¹¹

12. Polla sent a letter to the Licensee shortly after the incident, advising that the violation had been referred to a supervisor for possible agency action. The Commissioner of DPS thereafter notified the Licensee that it was in violation of Minn. Stat. § 340A.502 for selling alcohol to an obviously intoxicated person and imposed a \$200 civil penalty for the violation. The Licensee requested a hearing to appeal the imposition of the \$200 civil penalty.

13. On January 15, 2010, the Department issued a Notice and Order for Hearing in this matter. The hearing took place at the Office of Administrative Hearings on February 16, 2010.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Department of Public Safety have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 14.57, and 340A.415.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department of Public Safety has complied with all relevant substantive and procedural requirements of law and rule.

⁸ Test. of C. Emmert.

⁹ Testimony of S.A.

¹⁰ Test. of C. Emmert.

¹¹ Test. of M. Polla.

3. Minn. Stat. § 340A.502 prohibits any person from selling, giving, furnishing or in any way procuring “for another alcoholic beverages for the use of an obviously intoxicated person.”

4. Minn. Stat. § 340A.415 states in pertinent part:

340A.415 License revocation or suspension; civil penalty.

On a finding that the license or permit holder has ... (5) failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages, the commissioner ... may revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty of up to \$2,000 for each violation, or impose any combination of these sanctions. No suspension or revocation takes effect until the license or permit holder has been given an opportunity for a hearing under sections 14.57 to 14.69 of the Administrative Procedure Act. ...

5. The Department proved by a preponderance of the evidence that the Respondent provided an alcoholic beverage to an obviously intoxicated person on October 10, 2009, in violation of Minn. Stat. § 340A.502.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Public Safety affirm the civil penalty of \$200 imposed for Respondent’s violation of Minn. Stat. § 340A.502.

Dated: March 4, 2010

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Public Safety (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Michael Campion, Commissioner of Public Safety, 444 Cedar Street, Saint Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minnesota Statutes § 14.62 (2a). The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota Statutes § 14.62 (1), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The standard for determining whether a person is “obviously intoxicated” is “whether exercising reasonable powers of observation, one sees or should see that the buyer is intoxicated.”¹² The word “obviously” has been defined as “that which is easily discovered or seen or understood, or such as is readily perceived by the eye or the intellect, or that which is plain or evident.”¹³ A finding of obvious intoxication does not require proof of any specified amount of drinking or any specific degree or level of intoxication.¹⁴

Special Agent Emmert credibly testified that S.A. walked unsteadily to the bar and noticeably swayed while talking to the bartender. He also testified that S.A.’s speech was slurred and thick. These observations should have caused the bartender to conclude that S.A. was obviously intoxicated. Moreover, the bartender’s response, when told that she had just served an obviously intoxicated person, was “So what? I’m his ride home.” She appeared to believe that service to an obviously intoxicated person was permissible if she knew the person would not be driving.

The Respondent presented testimony from S.A., who testified that he consumed four beers over the four hours he had been in the bar; the record is silent as to whether S.A. had consumed any alcohol before going to the bar. S.A. acknowledged that he is an “experienced drinker” and that his driver’s license was either suspended or revoked because of three previous DWI convictions. The Respondent also presented testimony from another employee, who had joined the group at about 10:30 p.m. and was sitting next to S.A. at the table. This employee did not believe S.A. was intoxicated or impaired. She said she saw him consume only one beer before Emmert approached him. The employee’s testimony also appeared to be truthful, but she had her back to the bar the whole time, and she did not see S.A. while he walked to and from the bar or while he was talking to the bartender. She described S.A. as a person who normally walks with a sway or “swagger” even when he is not drinking, and she believed Emmert mistook this normal mannerism for intoxication. S.A. walked in and out of the hearing

¹² *Jewett v. Deutsch*, 437 N.W.2d 717 (Minn. App. 1989); see also *Strand v. Village of Watson*, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955).

¹³ *Ritter v. Village of Appleton*, 254 Minn. 30, 37, 93 N.W.2d 683, 687 (Minn. 1958).

¹⁴ *Strand v. Village of Watson*, 245 Minn. 414, 72 N.W.2d 609 (Minn. 1963).

room twice in the course of the hearing, and the mannerism she described was not apparent to the ALJ.

The evidence is not overwhelming; but the Department is required to prove only that it is more likely than not that Respondent served an alcoholic beverage to an obviously intoxicated person. The ALJ concludes the Department has met this burden and accordingly recommends that the \$200 civil penalty be affirmed.

K.D.S.